

<sup>1</sup> Application for Review at 2 (filed Dec. 31, 2007).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The facts surrounding this claim are simple. On September 18, 2007, the claimant was in the process of helping his co-workers perform certain cleaning tasks. At one point claimant had to go to a different area and walked past a piece of equipment. Someone called out and he turned around, striking his head on the equipment. Claimant testified that he was stunned for a moment, reached for his head and found no blood. He worked the balance of the day, but called in sick the following few days. At that time he was suffering from headaches and experienced a sensitivity to light.

When claimant called in he simply took sick leave and did not inform respondent of the work-related accident. Then, on September 21, 2007, claimant went to work as scheduled and before his shift began he informed respondent of the accident. Claimant explained that because he hits his head frequently while working, he did not believe he was seriously hurt. Thus, he did not immediately report this accident. He further explained that he did not know of any witnesses to the accident.

Although claimant did not realize it, his accident was witnessed by Roy Moore, a co-worker. When respondent began to investigate this claim, Roy Moore volunteered that he saw the accident and his recitation of the events is much the same as the claimant's. Nonetheless, Cindy Nace, the workers compensation and employee benefits manager, was suspicious. She believed that because claimant did not report this accident immediately, took sick leave for a few days, and because claimant denied Mr. Moore's presence at the accident, there was a basis for believing the accident did not happen.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>3</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>4</sup>

---

<sup>2</sup> K.S.A. 44-501(a).

<sup>3</sup> K.S.A. 44-508(g).

<sup>4</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Based upon these facts the ALJ concluded that claimant met his burden of proof and ordered medical treatment and TTD benefits. And after reviewing the entire record, this Board Member agrees with this determination. Aside from Ms. Nace's suspicions, there is no evidence to suggest that claimant did not sustain the accident he describes. All of the medical records reflect a consistent history of a concussion-type injury in the manner claimant describes. He most certainly had cervical surgery back in 2003 and how this present accident relates to his past medical history is, as of yet, unexplored. But claimant has met his burden to establish an accidental injury arising out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>5</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated December 21, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2008.

---

JULIE A.N. SAMPLE  
BOARD MEMBER

c: James E. Benfer, III, Attorney for Claimant  
John A. Bausch, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge

---

<sup>5</sup> K.S.A. 44-534a.